NO. 19-605

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

PHILIP JOHN MARTIN,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

There is no dispute that the constitutional question presented here is important. Nor does Martin dispute that this case presents an ideal vehicle to decide the issue. And Martin acknowledges both a collision here of the Court's competing Double Jeopardy rules, as well as a conflict among lower courts over which of these competing principles governs a case in *this* posture. Moreover, Martin's efforts to minimize the conflict have the opposite effect—confirming that lower courts disagree over which precedents apply and which facts are material to the constitutional analysis. Martin's emphasis of certain facts (e.g., no mistrial declared) and downplaying of other facts (e.g., first jury "unable to agree" on first-degree murder) gives all the more reason to grant certiorari to resolve the conflict.

As the Petition discussed (at 12-18), the Arizona Supreme Court applied an unjustified and expansive view of *Green v. United States*, 355 U.S. 184 (1957), while disregarding other core Double Jeopardy principles, including the continuing-jeopardy rule. Notably, Martin makes *no attempt* to explain how the decision below can be reconciled with the Court's continuing-jeopardy rule. And the decision below is not only wrong on the merits, it comes with policy implications—as eleven Amici States explain, the Arizona Supreme Court's approach has the practical effect of pushing States to choose hard-transition over soft-transition jury instructions.

The Court should grant certiorari and reverse.

ARGUMENT

I. Martin Acknowledges The Collision Here Of Competing Lines Of The Court's Cases And Doctrines

Arizona's Petition (at 11-18) walked through the Court's competing doctrines and case lines that collide where a jury expressly states it is unable to agree on a greater charge, convicts on a lesser charge, and defendant's appeal reverses the conviction: (1) the hung-jury rule embodied by *Richardson v. United States*, 468 U.S. 317 (1984); (2) the rule articulated in *Green v. United States*, 355 U.S. 184 (1957), and *Price v. Georgia*, 398 U.S. 323 (1970), which most courts have construed as an implied-acquittal rule (*see infra*, Section II); and (3) the continuing-jeopardy rule.

Martin agrees the Court has never squarely answered the question presented (BIO 1-5), but attempts (at 23-25) to explain away the collision by defending the Arizona Supreme Court's choice to apply *Green*'s implied-acquittal rule instead of *Richardson*'s hung-jury rule. Yet he leaves a gaping analytical hole in *not even trying* to reconcile the decision with the continuing-jeopardy rule. Instead, like the Arizona Supreme Court, he turns (at 5, 25) to *Arizona v. Washington*, where the Court explained that a prosecutor bears a "heavy" burden in "demonstrat[ing] 'manifest necessity' for any mistrial declared over the objection of the defendant." 434 U.S. 497, 505 (1978). But the first trial was not terminated over Martin's objection; there was no double-jeopardy bar for the State to lift here because Martin's successful appeal continued jeopardy on both

the greater and lesser offenses. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 363 (2016) ("Th[e] 'continuing jeopardy' rule neither gives effect to the vacated judgment nor offends double jeopardy principles. Rather, it reflects the reality that the 'criminal proceedings against an accused have not run their full course.'").[1]

Martin's acknowledgement of the Court's competing case lines, alongside his avoidance of the continuing jeopardy rule and reliance on the manifest necessity standard, only confirms that the Court's intervention is necessary to resolve the collision here. Indeed, lower courts have failed to reach agreement on how to harmonize these rules.

II. Martin Acknowledges A Split, And His Efforts To Diminish It Fail

Martin agrees a split exists (at 11, 17-18, 21), although he insists it is "narrow" and attempts to wash away its depth and breadth (at 11-22). In this effort to weaken the conflict, Martin emphasizes factual distinctions; but Martin's efforts confirm that there is widespread disagreement over *Green*'s rule and the facts material to triggering the rule.

As set forth in Arizona's Petition (at 18-30), the Court's review is imperative to resolve the conflict and delineate how the Court's competing precedents

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[1] As the Petition noted (at 15 n.1), continuing jeopardy would *not* apply if Martin were acquitted of first-degree murder because "[a]cquittals, unlike convictions, terminate the initial jeopardy." *See Justice of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984). But Martin was acquitted of nothing.

and doctrines interact when a jury has expressly stated it is "unable to agree" on a defendant's guilt for a greater offense and convicts of a lesser offense that is later overturned on appeal.

A. The Decision Here Squarely Conflicts With Decisions Of The Eighth Circuit, The D.C. Court Of Appeals, And Four State High Courts

Martin concedes (at 17-18, 21) that the decision below conflicts with *State v. Glasmann*, 349 P.3d 829 (Wash. 2015). That Martin believes the Washington Supreme Court's decision is "poorly reasoned" (and the dissenting justice's view of *Green* correct), is reason to *grant* certiorari, not deny it.

Likewise, the cert-worthiness of Arizona's Petition is bolstered by Martin's attempts to shrink the acknowledged split.

First, the decision below conflicts with *Cleary v. State*, 23 N.E.3d 664 (Ind. 2015). Martin's parsing does not diminish the conflict. Martin contends (at 15) that *Cleary*'s "discussion of *Green* was relevant only to that court's holding that a state statute did not bar the retrial[.]" But in *Cleary*, the Indiana Supreme Court thoroughly analyzed the defendant's constitutional claim that his "second trial exposed him to 'jeopardy' as that term is used in both Indiana and federal jurisprudence," analyzed *Green* and *Price*, and concluded that "nothing in double jeopardy jurisprudence prohibits a retrial on the offenses where the jury is deadlocked." *Clearly,* 23 N.E.3d at 670-674. This holding starkly contrasts with the Arizona Supreme Court's conclusion that *Green* bars

retrial of a deadlocked offense in identical circumstances. Pet. App. 11-13.

Second, Martin asserts (at 12) that the New Mexico Supreme Court's decision in *State v. Martinez*, 905 P.2d 715 (N.M. 1995), does not conflict with the decision below because the *Martinez* offenses "were charged as separate offenses, not as a greater and lesser-included offense[.]" But the energy spent trying to pull *Martinez* out of the conflict is wasted; the issue here (does *Green*'s rule apply when a jury expressly deadlocked on one offense while convicting of another) is not limited to factual scenarios involving greater and lesser offenses. As the Petition noted (at 30-31), *Green* expressly stated that its holding is *not* limited to a greater-lesser offense scenario. 355 U.S. at 219 n.14 ("It is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense.").

Third, Martin spins his wheels arguing (at 12-17) that the decision below does not conflict with *Martinez*, *People v. Fields*, 914 P.2d 832 (Cal. 1996), *United States v. Allen*, 755 A.2d 402 (D.C. 2000), or *United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997). In Martin's view (at 12), that mistrials were declared in *Martinez*, *Fields*, and *Allen* "distinguishes those cases from this one" and brings those cases "within the exception to double jeopardy under *Richardson*[.]" Martin does acknowledge that *Bordeaux*'s broad holding conflicts with the decision below, but he asserts (at 17) that "elsewhere [in *Bordeaux*] the [Eighth Circuit] made clear that its holding depended on the fact that the district court had

declared a mistrial on the greater offense in the first trial."

The fact that the trial court here did not declare a mistrial in Martin's first trial does not weaken the conflict; it *strengthens* it. Martin's insistence that the absence or presence of a mistrial declaration is a *legally* significant fact in determining which of the Court's competing lines of cases and doctrines apply is another reason to *grant* review—it demonstrates confusion as to the legally significant facts here. And the Court often draws upon factual distinctions of precisely this sort in double jeopardy cases to determine which precedents govern. *See, e.g.*, *Currier v. Virginia*, 138 S. Ct. 2144, 2149-2150 (2018).

The disagreement over the manifest necessity standard (*supra*, Section I) is part of this mistrial confusion and further weighs in favor of granting certiorari. As noted above, the Arizona Supreme Court agrees with Martin that *Washington*'s manifest necessity standard, which applies in the mistrial context, should be layered on to the facts of this case, alongside *Green*'s rule. Pet. App. 9-10. But the California Supreme Court reached the opposite conclusion, stating that the manifest necessity doctrine is "distinct" from *Green*'s implied-acquittal rule and that "neither [*Green*'s] implied acquittal doctrine nor the doctrine of manifest [] necessity is properly invoked" when a jury is expressly deadlocked on a greater offense. *Fields*, 914 P.2d at 836-837.

Moreover, putting aside this obvious disagreement over the applicability of the manifest necessity standard and the legal significance of a mistrial declaration, the decisions in *Fields*, *Bordeaux*, *Allen*,

and *Martinez* did not turn on the fact that mistrials were requested or declared. *See Fields,* 914 P.2d at 837-838; *Bordeaux*, 121 F.3d at 1193; *Allen*, 755 A.2d at 408-410; *Martinez*, 905 P.2d at 717. Instead, these courts declined to apply *Green*'s rule to bar retrial of offenses on which juries were expressly deadlocked, finding instead that settled double jeopardy principles (predominately the hung-jury rule) permitted retrial. *See* Petition 19-25. But even assuming, *arguendo*, that any mistrial fact contributed to the holdings of these decisions, such a possibility is one more reason to grant certiorari and resolve the prevalent dispute.

B. The Circuit Split That Martin Acknowledges Further Supports Review

As the Petition explained (at 25-27), the decisions of the Second, Fourth, Seventh, and Tenth Circuits are irreconcilable with the Arizona Supreme Court's conclusion that double jeopardy protection is available under *Green* absent an implied acquittal. These circuits view *Green*'s rule as narrow and limited, concluding that double jeopardy protection under *Green* is available *only* when a jury may have implicitly acquitted of a greater or alternative offense. Petition 25-26.[2] And the state high courts of West Virginia and Massachusetts have relied on this circuit author-

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[2] As the Petition noted (at 20 n.2), the Fifth Circuit took a similar stance, albeit in *dicta*, confirming that, if confronted with the question presented, it would "agree with the Eighth Circuit." *United States v. Williams*, 449 F.3d 635, 645 (5th Cir. 2006) (quoting *Bordeaux*'s broad holding).

ity to reject double jeopardy claims premised on *Green*. *Id.*

In contrast, the Arizona Supreme Court decided that "an implied acquittal is sufficient but not necessary for jeopardy to terminate" on a greater offense under *Green*. Pet. App. 9. This conclusion aligns only with the Sixth Circuit's decision in *Terry v. Potter*, 111 F.3d 454 (6th Cir. 1997), and an intermediate state court's decision. Petition 28-29.

Martin admits (at 18-20) that there *is* "disagreement between the Sixth and Second Circuits" in *Terry* and *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1044-1049 (2d Cir. 1972). Yet Martin asserts such disagreement is "on a question not presented here" that does not warrant the Court's intervention in this case. BIO 20. He is mistaken. The sole justification he gives for distancing this case from *Terry* and *Follette* is that in those cases, the defendants were "convicted in successive trials of two different versions of the same crime," so those cases did not involve the lesser-greater offense scenario here. *Id.* But as discussed in Section II(A) above, latching on to such technical distinctions cannot overcome what the Court plainly stated in *Green*—that it was "immaterial" to the Court's analysis that the second-degree murder offense was a lesser-included offense of felony murder. 355 U.S. at 219 n.14.

Simply put, all roads lead back to the widespread and pronounced debate over the scope of *Green*'s rule. *Compare, e.g.*, *Follette*, 462 F.2d at 1044-1049 (distinguishing *Green* and holding double jeopardy did not bar retrial for felony murder; emphasizing

defendant "was not acquitted on his first trial of felony murder"), *with Terry*, 111 F.3d at 460 (noting *Follette* "reached the opposite conclusion in a similar case" and disagreeing with the Second Circuit's reading of *Green*).

Martin offers no other reason to overlook the longstanding, unequivocal conflict between the Second and Sixth Circuits. The Court should seize the opportunity to settle the split now by granting review here.

C. Martin's Other Arguments Suggest That The Conflict Is Even More Pronounced

The conflict is well-established and ripe for review. And the remaining points sprinkled in Martin's brief suggest that the conflict is even more deserving of the Court's attention.

First, Martin asserts the decision below "is in accord with" *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, 858-863 (2d Cir. 1965), where the Second Circuit relied on *Green* to hold that it was fundamentally unfair under the Due Process Clause to retry the defendant for first-degree murder after his first trial. In *Wilkins*, however—as in *Green*, and *unlike* the case here—the jury was silent on first-degree murder. *Id.* at 858. Thus, *Wilkins* is an implied acquittal case that can be harmonized with *Follette*, 462 F.2d at 1044-1049, where the Second Circuit rejected the defendant's *Green* claim in the absence of an implied acquittal.

Second, Martin argues that the decision below "does align" with the Ninth Circuit's habeas decision in *Brazzel v. Washington*, 491 F.3d 976 (9th Cir.

2007). BIO 19-21. But in *Lemke v. Ryan*, a more recent habeas appeal, the Ninth Circuit emphasized that the Court has not "conclusively addresse[d] [this] situation" and that "circuit law provides no binding answer" on the question presented. 719 F.3d 1093, 1100, 1103 (9th Cir. 2013).

In any event, if Martin is correct, this means that the split over *Green*'s rule is even *more* pronounced and deserving of clarification.

III. The Question Presented Is Bound To Recur But May Not Come To The Court In This Ideal Posture

Martin does not dispute that this case is in the best possible posture for the Court to resolve the conflict and clarify the interaction of its competing double jeopardy precedents and doctrines. But Martin asks the Court to wait "until a deeper conflict arises, if ever." BIO 23. Yet the decision below already deepened a prevalent conflict. *See* Section II; *see also* Petition 18-30. Neither the split nor the broader disagreement over *Green*'s rule will resolve itself, and there is no need to await further percolation.

And the established conflict has significant consequences in criminal cases across the country, particularly in the habeas context. In *Saulsberry v. Lee*, for example, the Sixth Circuit recently considered a double jeopardy claim similar to the one here, premised on *Green*. 937 F.3d 644, 649-651 (6th Cir. 2019). The defendant argued, as does Martin, that "[a]bsent a justified mistrial … jeopardy must terminate whenever the trial court sends the jury home without rendering a verdict on a count" and "point[ed] to *Green* [] as supporting this rule." *Id*. at 649-650.

Each judge resolved the claim differently, reaching no agreement about what *Green* stands for. *See id.* at 650-654. And the Ninth Circuit will similarly face inconsistent outcomes, as there is no binding precedent on the question presented, *see Lemke*, 719 F.3d at 1103, and Arizona now stands against two other in-circuit state supreme courts (Washington and California). *Supra*, Section I(A).

Absent the Court's intervention, the question presented is bound to recur with no hope of consistent application. And the procedural posture of this case, which comes to the Court on direct review with a clean record, makes review now all the more attractive.

IV. The Decision Below Is Wrong And Its Approach Brings Practical Policy Consequences

As the Petition well explained (at 12-18), the resolution below is manifestly erroneous—untethered from *Richardson*'s hung-jury rule and the continuing-jeopardy rule, which "serves both society's and criminal defendants' interests in the fair administration of justice." *Bravo-Fernandez*, 137 S. Ct. at 363. And the Court has made clear that *Green*'s second rationale—disallowing the State to use "all its resources and power … to make repeated attempts to convict an individual for an alleged offense," 355 U.S. at 187, "is *not* a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution." *United States v. Scott*, 437 U.S. 82, 95-96 (1978) (emphasis added); *see also* Petition 16.

Contrary to Martin's misapprehension, Arizona has never argued that Martin waived his double jeopardy claim altogether.[3] Rather, Martin's retrial for first-degree murder did not run afoul of the Double Jeopardy Clause under the hung-jury and continuing-jeopardy rules. The decision below disregarded these settled principles, applied an expansive reading of *Green* in isolation, and should be reversed.

Finally, as the eleven Amici States well explain (at 2-10), the erroneous approach here infringes on State authority to decide whether to adopt hard-transition (i.e., "acquittal first") or soft-transition (i.e., "reasonable efforts") jury instructions. *See United States v. Tsanas*, 572 F.2d 340, 344-346 (2d Cir. 1978) (summarizing considerations). The decision below effectively created a *new* rule: that jeopardy terminates on a greater offense whenever a jury is expressly deadlocked on that offense and there is a conviction for a lesser offense, even if the conviction is later reversed on appeal. This rule may push soft-transition States into adopting hard transitions to preserve entitlement to a full and final resolution of the charged offenses. *See Richardson*, 468 U.S. at 326. Indeed, the Arizona Supreme Court suggested its decision may warrant a departure from Arizona's preference for soft-transition instructions. Pet. App. 12; *see also* Pet. App. 15-18 (Gould, J., concurring).

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[3] Prior to *Green*, *Trono v. United States* held that appeal of a conviction waives all double jeopardy protections. 199 U.S. 521, 533 (1905). But *Green* limited *Trono*'s holding to its "peculiar factual setting." *Green*, 355 U.S. at 197.

Judicial decisions that misapply constitutional principles should not be the impetus for such dramatic policy shifts, which have significant and lasting consequences for States and defendants alike. Granting Arizona's Petition will help preserve State authority to make these important policy choices. *See* Amici States' Brief 2-10.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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